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No. 88-1784

In The

Supreme Court of the United States

October Term, 1988

GREAT REPUBLIC INSURANCE COMPANY and GREAT REPUBLIC LIFE INSURANCE COMPANY,

Petitioners,

vs.

La VERNE CHEVAL, By And Through Her Conservator, MARTIN MILLER,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI
STATEMENT OF THE CASE

The relevant facts are set forth in the opinion of the California Court of Appeal.[1] These facts show that petitioners are in the business of selling nursing home insurance. Petitioners sold a "SKILLED NURSING HOME INSURANCE" policy to respondent La Verne Cheval. The policy promises to pay the policyholder $40 for each day the policyholder is "necessarily and continuously" confined to a skilled nursing home, on the advice of a physician.

In January, 1985, Mrs. Cheval's doctor placed her in a skilled nursing home, following a fall that broke her hip. The broken hip was another step in the gradual deterioration of Mrs. Cheval's health that began when she suffered a stroke in 1983. In addition to the broken hip, she suffered from heart disease and advanced diabetes. The diabetes had left her legally blind. She was also deaf, incontinent of bowel and bladder, and unable to walk. She required constant observation by skilled nurses because she was a "brittle" diabetic, i.e., one who is subject to rapid changes in her blood sugar levels. A brittle diabetic in Mrs. Cheval's frail condition requires close observation because an undetected change in her blood sugar could be fatal. On top of all this, Mrs. Cheval received potentially toxic heart medication when her apical pulse (the heart beat as measured by a stethoscope) dropped below a certain rate. As Mrs. Cheval's doctor

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[1] That opinion is included in the Appendix to the Petition for Writ of Certiorari, at A-4 to A-18.

told petitioners on one occasion, the need for skilled nursing care would be obvious to petitioners if they ever saw Mrs. Cheval. They never did.

Incredibly, in August 1985 petitioners decided that Mrs. Cheval no longer required "skilled nursing care". Petitioners made this decision knowing full well that Mrs. Cheval was receiving the same nursing services that petitioners had up until that time considered skilled nursing care. This and other evidence showed that petitioners employed an ever-changing definition of skilled nursing care that became increasingly more restrictive as Mrs. Cheval's health deteriorated. As a result, treatment considered to be skilled nursing care in 1983 was no longer covered by the same policy in 1985.

At trial, California nursing home experts – including Mrs. Cheval's physician, the nursing director of the skilled nursing facility, and a representative of Medi-Cal, the state sponsored health insurance program – emphatically agreed that under California law Mrs. Cheval could not be admitted to any nursing home that provided anything less than skilled and continuous nursing care. *Petitioners never presented any contrary evidence.*

After a week long trial, the jury awarded Mrs. Cheval $32,200 in contract damages. The parties stipulated that the reasonable attorney's fees owed to her as a result of the bad faith denial of her insurance claim amounted to $8,050. The jury also awarded $500,000 in punitive damages, to punish petitioner for its fraudulent marketing of an insurance policy that promised far more than petitioners intended to deliver, and also to deter petitioners from handling in a similar manner any future claims from

the thousands of other people in California who had stored this insurance policy in a desk drawer or safety deposit box, intending to use it as a safety net when calamity struck.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH AMENDMENT ISSUE PRESENTED BY THE PETITION WAS NOT PRESSED AND PASSED UPON BELOW.

This Court has repeatedly held that it is without authority to review the decision of a state court unless it affirmatively appears that a Federal question was actually raised and actually decided. *Cardinale v. Lousiana*, 394 U.S. 437, 439 (1969). The reasons for this long-recognized rule are set forth in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940):

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to

consider any grounds of attack not raised or decided in that court."

Whether the failure to raise properly a federal question in state court is a jurisdictional defect or a prudential limitation on the exercise of jurisdiction appears to be an open question. *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S.Ct. 1645, 1651, 100 L.Ed.2d 62 (1988). In any event, the Eighth Amendment question cannot be considered by this Court because that question was neither raised in nor decided by the California Court of Appeal.

A. Petitioners Did Not Raise The Eighth Amendment Issue In The Court Of Appeal.

It is well-recognized that a bare reference to the "Constitution of the United States" is insufficient to raise a Federal question. *See, e.g., Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Bowe v. Stott*, 233 U.S. 658, 664-65 (1914).

Here, petitioners merely asked the Court of Appeal to defer its decision until this Court had issued its decision in *Bankers Life*. Petitioners' *entire* argument in the Court of Appeal on the constitutionality of punitive damages is set forth at page A-23 of the Appendix attached to the Petition. Petitioners did not challenge the California punitive damage statute on the basis of either the Fourteenth Amendment or the Eighth Amendment.[2] Instead,

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[2] California Civil Code sections 3294 and 3295 instruct when and how punitive damages may be awarded. The statute

(Continued on following page)

petitioners elected to let their constitutional challenge rise or fall with *Bankers Life*.

This Court issued its decision in *Bankers Life* on May 16, 1988, weeks before respondent filed her opposition to petitioners' opening brief in the Court of Appeal, and months before the Court of Appeal filed its decision on January 5, 1989. Petitioners' constitutional challenge to the punitive damages expired when this Court elected not to review the constitutionality of punitive damages in *Bankers Life*. At no time after *Bankers Life* was decided did petitioners recast or renew their constitutional argument. In fact, their 44 page reply brief in the Court of Appeal contains no mention of any constitutional issues. Similarly, petitioners never raised any constitutional issues during oral argument. It appears, therefore, that petitioners had no constitutional claim whatsoever before the Court of Appeal when the court issued its decision in January, 1985.

(Continued from previous page)

was amended after the jury verdict in this case. *See*, Cal. Stats. 1987, ch. 1498, §§ 5 and 6. The amended statutes provide that punitive damages may be awarded only upon "clear and convincing evidence" that a defendant has acted with malice, fraud or oppression, as those terms are defined by the statute. Cal. Civ. Code § 3294, subd. (a). In addition, evidence of a defendant's financial condition may not be introduced at trial until the jury has found the defendant guilty of malice, fraud or oppression. Cal. Civ. Code § 3295, subd. (d). The amendments address several of the issues raised by petitioners, rendering this case of interest only to the parties involved. This is another reason to deny the petition.

B. The Court Of Appeal Did Not Rule On The Eighth Amendment Question.

This Court has frequently stated that "when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *Webb v. Webb*, 451 U.S. 493, 495 (1981). Petitioners assert that the Court of Appeal resolved the Eighth Amendment issue in the court's one sentence statement that "[d]efendant's attack on the constitutionality of punitive damages, raised for the first time on appeal, is without merit." Petition, at 4. However, the case cited by the Court of Appeal, *Toole v. Richardson-Merrell Inc.*, 251 Cal.App.2d 689, at pages 716-17, (1967) makes no reference to the Eighth Amendment.

It is apparent that the Eighth Amendment issue petitioners now raise is a mere afterthought. It was never raised at trial, never mentioned on appeal. The parties never debated the merits of this argument. More importantly, there is no record that the California Court of Appeal decided this Federal question. It would be error to presume that it did.

II.

THIS CASE IS NOT SIMILAR TO *BROWNING-FERRIS INDUSTRIES.*

Petitioners assert the instant case is similar to *Browning-Ferris Industries v. Kelco Disposal, Inc., cert granted,* ___ U.S. ___, 109 S.Ct. 527, 102 L.Ed.2d 529 (1988). Petitioners

have asked this Court to hold the petition until a decision is reached in *Browning-Ferris*. Petition, at 28.

There are several differences between this case and *Browning-Ferris*. First, the damages are of a very different order of magnitude. *Browning-Ferris* involves actual damages of approximately $50,000 and punitive damages of $6 million. Here, the actual damages are $40,250 and the punitive damages are $500,000. Because the question of excessiveness is one of degree, the amount of the damages is necessarily relevant in determining whether constitutional boundaries (if any exist) have been exceeded. The damages in the instant case are not disproportionate to the actual harm suffered, and are not otherwise excessive.

Second, the conduct to be punished and deterred is qualitatively different. Petitioners and respondent in this case are not two competitors locked in a commercial dispute, as is the case in *Browning-Ferris*. Rather, respondent was a frail, elderly woman trying to collect insurance benefits she needed in order to pay for her nursing home care. It is utterly reprehensible for an insurance company, faced with such a claim, to invent a series of false excuses for not paying the claim, leaving the insured without the benefits she relied on to pay her medical bills. Both the trial court judge and the California Court of Appeal examined petitioners' conduct and found the damages awarded by the jury to be appropriate.

Third, the California punitive damage statute provides a completely different standard for awarding punitive damages than Vermont, the state where *Browning Ferris Industries* arose. California jury instructions provide

guidelines to assist the jurors in determining whether punitive damages should be awarded, and if so, in what amount. See, *Book of Approved Jury Instructions* (BAJI) No. 14.71 (7th ed. 1988 pocket pt.). Moreover, California has a well-developed body of case law that guides the trial court in ruling on a motion to remit the punitive damages. *See, e.g., Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 927, 582 P.2d 980, 148 Cal.Rptr. 389 (1978).

The damages awarded in this case do not give cause for review by this Court, even if the Eighth Amendment issue had been properly preserved in the state court.

CONCLUSION

For the reasons stated above, respondent requests that the petition be denied.

Respectfully submitted,

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 3.21, at 149-50 (6th ed. 1986) 2

INTRODUCTION

Respondent's opposition contains erroneous statements of fact and law. Contrary to respondent's contentions, Great Republic raised the constitutional challenge to punitive damages in the courts below, and the 1988 revision to California Civil Code section 3294 and California's standard jury instructions does not remedy the serious constitutional infirmities of California's punitive damage scheme.

I.

PETITIONERS PROPERLY RAISED THE CONSTITUTIONAL CHALLENGE TO PUNITIVE DAMAGES.

Respondent contends Great Republic did not properly raise below its constitutional challenge to California's punitive damage scheme. Opposition to Petition for Writ of Certiorari (hereinafter "Opposition") at 4-5. This is incorrect.

In Great Republic's Petition for Writ of Certiorari (hereinafter "Petition"), we observed the California Supreme Court has rejected constitutional attacks on punitive damages based upon due process arguments, thus making it futile for Great Republic to raise such issues in the trial court or court of appeal. *See* Petition at 1-2 n.1. The due process issues were therefore preserved by raising them in the petition for review to the California Supreme Court.[1]

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[1] Under *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 292 n.1, 758 P.2d 58, 60 n.1, 250 Cal. Rptr. 116, 118 n.1 (1988), the California Supreme Court would have deemed it

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The California Supreme Court cases we cited, *see id.*, did not expressly address the Eighth Amendment issue. Nonetheless, Great Republic preserved the Eighth Amendment issue below.

This Court will consider federal claims *either* raised *or* considered and resolved by the appropriate state court below. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.21, at 149-50 (6th ed. 1986). The Eighth Amendment attack on punitive damages was explicitly raised in the California Supreme Court in Great Republic's petition for review. Petition app. at A-26. This Court has held that raising a federal question initially in the state's highest court is sufficient to preserve the question if state law does not consistently bar such procedure. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982) (cited in *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988)); *Barr v. Columbia*, 378 U.S. 146, 149 (1964).

California law does not consistently bar this procedure. Rule 29(b)(1) of the California Rules of Court provides that "on petition for review the [California] Supreme Court *normally* will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal" (emphasis added). This rule cannot be characterized as a consistent bar to

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(Continued from previous page)

futile to raise these issues in the court of appeal because the supreme court's decisions finding no due process violation are controlling.

raising an issue for the first time in the California Supreme Court. *See, e.g., Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1118, 751 P.2d 923, 932, 245 Cal. Rptr. 658, 667 (1988) ("Defendants respond that the issue is not properly before us, as it was not raised below (Cal. Rules of Court, rule 29), a contention we reject in light of the issue's great public importance"); *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 405, 353 P.2d 725, 729, 6 Cal. Rptr. 13, 17 (1960) ("Defendant has been permitted to raise this issue for the first time in this court because the facts are not disputed and the issue merely raises a new question of law"). In fact, it is the general rule in California that appellate courts have discretion to consider a constitutional issue, presented on undisputed facts, raised for the first time on appeal. *See, e.g., Hale v. Morgan*, 22 Cal. 3d 388, 394, 584 P.2d 512, 516, 149 Cal. Rptr. 375, 379 (1978); *Flores v. Natividad Medical Center*, 192 Cal. App. 3d 1106, 1117-1118, 238 Cal. Rptr. 24, 30-31 (1987). Because the California Supreme Court had discretionary authority to hear the Eighth Amendment issue raised in Great Republic's petition for review, it cannot be said that the denial of the petition was a "silent application of a procedural bar." *Hathorn*, 457 U.S. at 263.

Evening assuming arguendo it was not sufficient to raise the Eighth Amendment issue for the first time in the California Supreme Court, the issue was raised in the California Court of Appeal as well. Great Republic requested that the court of appeal align its ruling with the upcoming decision in *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645. Petition app. at A-23. Appellants in *Bankers Life* raised both Eighth Amendment and due process issues. *See Bankers Life*, 108 S. Ct. at 1649-50.

Hence an Eighth Amendment ruling in that case would have bound the court of appeal in this case. The issue was clearly before the court of appeal.

The court of appeal in fact ruled on Great Republic's constitutional attack on punitive damages, citing *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 417-18 (1967), which held that constitutional guarantees applicable to criminal proceedings are not required in civil actions. Apparently, the court of appeal in this case interpreted *Toole* as rebutting Great Republic's Eighth Amendment as well as its due process attack on the punitive damage award.

Great Republic did not raise the Eighth Amendment issue in the trial court, but it was not necessary to do so in order to preserve the issue for review by the court of appeal. As discussed above, the court of appeal reached the issue on the merits even though it had not been raised in the trial court. Moreover, on February 26, 1987, the court of appeal, in *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988), expressly rejected an Eighth Amendment attack on California's punitive damage statute. *Id.* at 1100-01 ("Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved here"). The present case went to trial after *Downey Sav. & Loan Ass'n*, on July 27, 1987, Petition app. at A-1, and the trial court was therefore bound by the *Downey Sav. & Loan Ass'n* decision. *See Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 323-24 (1962). Hence it was pointless for Great Republic to raise the Eighth Amendment issue in the trial court. *See Moradi-Shalal v.*

Fireman's Fund Ins. Cos., 46 Cal. 3d at 292 n.1, 758 P.2d at 60 n.1, 250 Cal. Rptr. at 118 n.1.

In sum, Great Republic did everything necessary to preserve the Eighth Amendment issue for review in this Court.

II.

RESPONDENT MISCHARACTERIZED THE CURRENT STATE OF CALIFORNIA'S PUNITIVE DAMAGE LAW.

Respondent implies that the 1988 revision to California standard jury instruction, Book of Approved Jury Instructions (BAJI) No. 14.71 (7th ed. 1988 supp.) remedied the constitutional infirmities articulated by Great Republic in its petition. Opposition at 7-8. Not so.

As was stated in the petition for certiorari, revised BAJI No. 14.71 retains the constitutional inadequacies of its 1986 predecessor. Petition at 14-18. For the Court's convenience we have attached at App., A-1 the text of both BAJI No. 14.71 (7th Ed. 1986), which was given to the jury in this case, and BAJI No. 14.71 (7th ed. 1988 supp.). A comparison of the two instructions makes clear the inaccuracy of respondent's implication that the revised instruction has corrected the constitutional failings of its predecessor.[2]

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[2] Although the 1988 revision to BAJI 14.71 does change the burden of proof to "clear and convincing evidence," it does not address the other constitutional deficiencies in California's punitive damage law: the lack of a "beyond a reasonable doubt" proof standard, the lack of a legislatively-prescribed statutory maximum, and the lack of any meaningful standards governing a jury's determination of the amount of a punitive award. It likewise does not remedy the Eighth Amendment problem.

Respondent also suggests amended Civil Code section 3294, effective January 1, 1988, remedies all the constitutional problems. This again is incorrect, for the same reasons stated above with regard to the revision of BAJI No. 14.71. It was the amendment to section 3294 that resulted in the revision of BAJI No. 14.71. (For the Court's convenience we have attached the text of the revised section 3294 at App., A-5.)[3]

Respondent is wrong that this case is "of interest only to the parties involved." Opposition at 5 n.2. It is of great interest to all California defendants with punitive damage claims pending, and, for that matter, all such defendants across the nation. We urge that a writ of certiorari be granted.

Respectfuly submitted,

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[3] The text of former section 3294 was attached to the petition at App., A-27.

APPENDIX

BAJI 14.71 (1986)

PUNITIVE DAMAGES – RECOVERY OF AND MEASURE

If you find that plaintiff suffered damage as a [proximate] [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant [___ only], for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [carried on by the defendant with a conscious disregard for the] [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount

to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

BAJI 14.71 (1988 Revision)

PUNITIVE DAMAGES – RECOVERY OF AND MEASURE – TRIAL NOT BIFURCATED

If you find that plaintiff suffered damage as a [proximate] [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant [___ only], for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of

[oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [despicable conduct which is carried on by the defendant with a willful and conscious disregard for the [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Despicable conduct" is conduct which is so [vile,] [base,] [contemptible,] [miserable,] [wretched,] [or] [loathsome] that it would be looked down upon and despised by ordinary decent people.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

[(3) The amount of actual damages.]

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

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§ 3294. Exemplary damages; when allowable; definitions

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by *Chapter 1498 of the Statutes of 1987* apply to all actions in which the initial trial has not commenced prior to January 1, 1988.